

Appendix B

TMDL Statute

Arizona's TMDL statute, adopted in July 2000, identifies the process by which ADEQ will make impaired waters listing decisions and develop Total Maximum Daily Loads (TMDLs) as required by the federal Clean Water Act § 303(d). A copy of this statute (Arizona Revised Statutes Title 49, Chapter 2, Article 2.1) can be downloaded at the Secretary of State Office web site at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>.

§49-231. Definitions

In this article, unless the context otherwise requires:

1. "Impaired water" means a navigable water for which credible scientific data exists that satisfies the requirements of § 49-232 and that demonstrates that the water should be identified pursuant to 33 United States Code § 1313(d) and the regulations implementing that statute.
2. "Surface water quality standard" means a standard adopted for a navigable water pursuant to § 49-221 and 49-222 and § 303(c) of the Clean Water Act (33 United States Code § 1313(c)).
3. "TMDL implementation plan" means a written strategy to implement a total maximum daily load that is developed for an impaired water. TMDL implementation plans may rely on any combination of the following components that the Department determines will result in achieving and maintaining compliance with applicable surface water quality standards in the most cost-effective and equitable manner:
 - a) Permit limitations.
 - b) Best management practices.
 - c) Education and outreach efforts.
 - d) Technical assistance.
 - e) Cooperative agreements, voluntary measures and incentive-based programs.
 - f) Load reductions resulting from other legally required programs or activities.
 - g) Land management programs.
 - h) Pollution prevention planning, waste minimization or pollutant trading agreements.
 - i) Other measures deemed appropriate by the Department.
4. "Total maximum daily load" means an estimation of the total amount of a pollutant from all sources that may be added to a water while still allowing the water to achieve and maintain applicable surface water quality standards. Each total maximum daily load shall include allocations for sources that contribute the pollutant to the water, as required by § 303(d) of the Clean Water Act (33 United States Code § 1313(d)) and regulations implementing that statute to achieve applicable surface water quality standards.

§49-232. Lists of impaired waters; data requirements; rules

- A. At least once every five years, the Department shall prepare a list of impaired waters for the purpose of complying with § 303(d) of the Clean Water Act (33 United States Code § 1313(d)). The Department shall provide public notice and allow for comment on a draft list of impaired waters prior to its submission to the United States Environmental Protection Agency. The Department shall prepare written responses to comments received on the draft list. The Department shall publish the list of impaired waters that it plans to submit initially to the Regional Administrator and a summary of the responses to comments on the draft list in the Arizona Administrative Register at least forty-five days before submission of the list to the Regional Administrator. Publication of the list in the Arizona Administrative Register is an appealable agency action pursuant to Title 41, Chapter 6, Article 10 that may be appealed by any party that submitted written comments on the draft list. If the Department receives a notice of appeal of a listing pursuant to § 41-1092, subsection B within forty-five days of the publication of the list in the Arizona Administrative Register, the Department shall not include the challenged listing in its initial submission to the Regional Administrator. The Department may subsequently submit the challenged listing to the Regional Administrator if the listing is upheld in the Director's final administrative decision pursuant to § 41-1092.08, or if the challenge to the listing is withdrawn prior to a final administrative decision.
- B. In determining whether a water is impaired, the Department shall consider only reasonably current credible and scientifically defensible data that the Department has collected or has received from another source. Results of water sampling or other assessments of water quality, including physical or biological health,

shall be considered credible and scientifically defensible data only if the Department has determined all of the following:

1. Appropriate quality assurance and quality control procedures were followed and documented in collecting and analyzing the data.
 2. The samples or analyses are representative of water quality conditions at the time the data was collected.
 3. The data consists of an adequate number of samples based on the nature of the water in question and the parameters being analyzed.
 4. The method of sampling and analysis, including analytical, statistical and modeling methods, is generally accepted and validated in the scientific community as appropriate for use in assessing the condition of the water.
- C. The Department shall adopt by rule the methodology to be used in identifying waters as impaired. The rules shall specify all of the following:
1. Minimum data requirements and quality assurance and quality control requirements that are consistent with subsection B of this section and that must be satisfied in order for the data to serve as the basis for listing and delisting decisions.
 2. Appropriate sampling, analytical and scientific techniques that may be used in assessing whether a water is impaired.
 3. Any statistical or modeling techniques that the Department uses to assess or interpret data.
 4. Criteria for including and removing waters from the list of impaired waters, including any implementation procedures developed pursuant to subsection F of this section. The criteria for removing a water from the list of impaired waters shall not be any more stringent than the criteria for adding a water to that list.
- D. In assessing whether a water is impaired, the Department shall consider the data available in light of the nature of the water in question, including whether the water is an ephemeral water. A water in which pollutant loadings from naturally occurring conditions alone are sufficient to cause a violation of applicable surface water quality standards shall not be listed as impaired.
- E. If the Department has adopted a numeric surface water quality standard for a pollutant and that standard is not being exceeded in a water, the Department shall not list the water as impaired based on a conclusion that the pollutant causes a violation of a narrative or biological standard unless:
1. The Department has determined that the numeric standard is insufficient to protect water quality.
 2. The Department has identified specific reasons that are appropriate for the water in question, that are based on generally accepted scientific principles and that support the Department's determination.
- F. Before listing a navigable water as impaired based on a violation of a narrative or biological surface water quality standard and after providing an opportunity for public notice and comment, the Department shall adopt implementation procedures that specifically identify the objective basis for determining that a violation of the narrative or biological criterion exists. A total maximum daily load designed to achieve compliance with a narrative or biological surface water quality standard shall not be adopted until the implementation procedure for the narrative or biological surface water quality standard has been adopted.
- G. On request, the Department shall make available to the public data used to support the listing of a water as impaired and may charge a reasonable fee to persons requesting the data.
- H. By January 1, 2002, the Department shall review the list of waters identified as impaired as of January 1, 2000 to determine whether the data that supports the listing of those waters complies with this section. If the data that supports a listing does not comply with this section, the listed water shall not be included on future lists submitted to the United States Environmental Protection Agency pursuant to 33 United States Code § 1313(d) unless in the interim data that satisfies the requirements of this section has been collected or received by the Department.
- I. The Department shall add a water to or remove a water from the list using the process described in § 49-232, subsection A outside of the normal listing cycle if it collects or receives credible and scientifically defensible data that satisfies the requirements of this section and that demonstrates that the current quality of the water is such that it should be removed from or added to the list. A listed water may no longer warrant classification as impaired or an unlisted water may be identified as impaired if the applicable surface water quality standards, implementation procedures or designated uses have changed or if there is a change in water quality.

§ 49-233. Priority ranking and schedule

- A. Each list developed by the Department pursuant to § 49-232 shall contain a priority ranking of navigable waters identified as impaired and for which total maximum daily loads are required pursuant to § 49-234 and a schedule for the development of all required total maximum daily loads.
- B. In the first list submitted to the United States Environmental Protection Agency after the effective date of this article, the schedule shall be sufficient to ensure that all required total maximum daily loads will be developed within fifteen years of the date the list is approved by the Environmental Protection Agency. Total maximum daily loads that are required to be developed for navigable waters that are included for the first time on subsequent lists shall be developed within fifteen years of the initial inclusion of the water on the list.
- C. As part of the rule making prescribed by § 49-232, subsection C, the Department shall identify the factors that it will use to prioritize navigable waters that require development of total maximum daily loads. At a minimum and to the extent relevant data is available, the Department shall consider the following factors in prioritizing navigable waters for development of total maximum daily loads:
 - 1. The designated uses of the navigable water.
 - 2. The type and extent of risk from the impairment to human health or aquatic life.
 - 3. The degree of public interest and support, or its lack.
 - 4. The nature of the navigable water, including whether it is an ephemeral, intermittent or effluent-dependent water.
 - 5. The pollutants causing the impairment.
 - 6. The severity, magnitude and duration of the violation of the applicable surface water quality standard.
 - 7. The seasonal variation caused by natural events such as storms or weather patterns.
 - 8. Existing treatment levels and management practices.
 - 9. The availability of effective and economically feasible treatment techniques, management practices or other pollutant loading reduction measures.
 - 10. The recreational and economic importance of the water.
 - 11. The extent to which the impairment is caused by discharges or activities that have ceased.
 - 12. The extent to which natural sources contribute to the impairment.
 - 13. Whether the water is accorded special protection under federal or state water quality law.
 - 14. Whether action that is taken or that is likely to be taken under other programs, including voluntary programs, is likely to make significant progress toward achieving applicable standards even if a total maximum daily load is not developed.
 - 15. The time expected to be required to achieve compliance with applicable surface water quality standards.
 - 16. The availability of documented, effective analytical tools for developing a total maximum daily load for the water with reasonable accuracy.
 - 17. Department resources and programmatic needs.

§ 49-234. Total maximum daily loads; implementation plans

- A. The Department shall develop total maximum daily loads for those navigable waters listed as impaired pursuant to this article and for which total maximum daily loads are required to be adopted pursuant to 33 United States Code § 1313(d) and the regulations implementing that statute. The Department may estimate total maximum daily loads for navigable waters not listed as impaired pursuant to this article, for the purposes of developing information to satisfy the requirements of 33 United States Code § 1313(d)(3), only after it has developed total maximum daily loads for all navigable waters identified as impaired pursuant to this article or if necessary to support permitting of new point source discharges.
- B. In developing total maximum daily loads, the Department shall use only statistical and modeling techniques that are properly validated and broadly accepted by the scientific community. The modeling technique may vary based on the type of water and the quantity and quality of available data that meets the quality assurance and quality control requirements of § 49-232. The Department may establish the statistical and modeling techniques in rules adopted pursuant to § 49-232, subsection C.
- C. Each total maximum daily load shall:
 - 1. Be based on data and methodologies that comply with § 49-232.
 - 2. Be established at a level that will achieve and maintain compliance with applicable surface water quality standards.

3. Include a reasonable margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. The margin of safety shall not be used as a substitute for adequate data when developing the total maximum daily load.
 4. Account for seasonal variations that may include setting total maximum daily loads that apply on a seasonal basis.
- D. For each impaired water, the Department shall prepare a draft estimate of the total amount of each pollutant that causes the impairment from all sources and that may be added to the navigable water while still allowing the navigable water to achieve and maintain applicable surface water quality standards. In addition, the Department shall determine draft allocations among the contributing sources that are sufficient to achieve the total loadings. The Department shall provide public notice and allow for comment on each draft estimate and shall prepare written responses to comments received on the draft estimates and draft allocations. The Department shall publish the determinations of total pollutant loadings that will not result in impairment and the draft allocations among the contributing sources that are sufficient to achieve the total loading that it intends to submit initially to the Regional Administrator, along with a summary of the responses to comments on the estimated loading and allocations, in the Arizona Administrative Register at least forty-five days before submission of the loadings and allocations to the Regional Administrator. Notwithstanding this subsection, draft allocations shall be submitted to the Regional Administrator only if that submission is required by the rules that implement 33 United States Code § 1313(d).
- E. Publication of the loadings and allocations in the Arizona Administrative Register is an appealable agency action pursuant to Title 41, Chapter 6, Article 10 that may be appealed by any party that submitted written comments on the estimated loadings and allocations. If the Department receives a notice of appeal of a loading and allocation pursuant to § 41-1092.03 within forty-five days of the publication of the loading and allocations in the Arizona Administrative Register, the Department shall not submit the challenged loading and allocations to the Regional Administrator until either the challenge to the loading is withdrawn or the Director has made a final administrative decision pursuant to § 41-1092.08.
- F. The Department shall make reasonable and equitable allocations among sources when developing total maximum daily loads. At a minimum, the Department shall consider the following factors in making allocations:
1. The environmental, economic and technological feasibility of achieving the allocation.
 2. The cost and benefit associated with achieving the allocation.
 3. Any pollutant loading reductions that are reasonably expected to be achieved as a result of other legally required actions or voluntary measures.
- G. For each total maximum daily load, the Department shall establish a TMDL implementation plan that explains how the allocations and any reductions in existing pollutant loadings will be achieved. Any reductions in loadings from nonpoint sources shall be achieved voluntarily. The Department shall provide for public notice and comment on each TMDL implementation plan. Any sampling or monitoring components of a TMDL implementation plan shall comply with § 49-232.
- H. Each TMDL implementation plan shall provide the time frame in which compliance with applicable surface water quality standards is expected to be achieved. The plan may include a phased process with interim targets for load reductions. Longer time frames are appropriate in situations involving multiple dischargers, technical, legal or economic barriers to achieving necessary load reductions, scientific uncertainty regarding data quality or modeling, significant loading from natural sources or significant loading resulting from discharges or activities that have already ceased.
- I. For navigable waters that are impaired due in part to historical factors that are difficult to address, including contaminated sediments, the Department shall consider those historical factors in determining allocations for existing point source discharges of the pollutant or pollutants that cause the impairment. In developing total maximum daily loads for those navigable waters, the Department shall use a phased approach in which expected long-term loading reductions from the historical sources are considered in establishing short-term allocations for the point sources. While total maximum daily loads and TMDL implementation plans are being completed, any permits issued for the point sources are deemed consistent with this article if the permits require reasonable reductions in the discharges of the pollutants causing the impairment and are not required to include additional reductions if those reductions would not significantly contribute to attainment of surface water quality standards.
- J. After a total maximum daily load and a TMDL implementation plan have been adopted for a navigable water, the Department shall review the status of the navigable water at least once every five years to determine if compliance with applicable surface water quality standards has been achieved. If compliance

with applicable surface water quality standards has not been achieved, the Department shall evaluate whether modification of the total maximum daily load or TMDL implementation plan is required.

§ 49-235. Rules

The Department shall adopt any rules necessary to implement this article.

§ 49-236. Report

By September 1, 2005, the Department shall submit a report to the Governor, the Speaker of the House of Representatives and the President of the Senate detailing progress made under this program and shall provide a copy to the Secretary of State and the Department of Library, Archives and Public Records. At a minimum, the report shall:

1. Evaluate the effectiveness of the total maximum daily load program and identify any recommended statutory changes to make the program more efficient, effective and equitable.
2. Assess the extent to which water quality problems that cannot be effectively addressed under the total maximum daily load program may be addressed under other federal or state laws.
3. Identify the number of appeals of department decisions under this article sought pursuant to title 41, chapter 6, article 10 and the disposition of those appeals, and assess the impact of those appeals on the Department's ability to administer the program effectively.

§ 49-237. Impact of successful judicial appeal of Arizona Department of Environmental Quality decision

If a person appeals to court and succeeds in overturning or modifying a final administrative decision of the Director pursuant to this article in an appeal initiated pursuant to Title 41, chapter 6, Article 10, within thirty days of the court's decision the Department shall take the steps necessary to implement the court's decision, unless the Director's decision that is overturned or modified was submitted to and approved by the Regional Administrator, in which case within thirty days of the court's decision the Department shall request that the Regional Administrator modify the approval to reflect the court's decision.

§ 49-238. Program termination

The program established by this article ends on July 1, 2010 pursuant to § 41-3102.